IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARY BAIN PEARSON and JOHN MASON, Plaintiffs	§	CIVIL ACTION NO. H-02-0670
v.	§	CONSOLIDATED LEAD NO. H-01-3624
ANDREW S. FASTOW, *et al*, Defendants	§	
RUBEN and IRENE DELGADO and PRESTON CLAYTON Plaintiffs	§	CIVIL ACTION NO. H-02-0673
v.	§	CONSOLIDATED LEAD NO. H-01-3624
ANDREW S. FASTOW, *et al*, Defendants	§	

THE *PEARSON* AND *DELGADO* PLAINTIFFS' JOINT REPLY TO ANDERSEN'S OPPOSITION TO REMAND

TO THE HONORABLE COURT:

Plaintiffs Mary Bain Pearson and John Mason, and Ruben and Irene Delgado and Preston Clayton jointly reply to the combined opposition to remand filed by Defendant Arthur Andersen, L.L.P. (Andersen).

I. INTRODUCTION

The *Pearson* action — filed on behalf of two plaintiffs — and the *Delgado* action — filed on behalf of three — were both brought in Harris County, Texas. Andersen improperly removed both actions under the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (SLUSA). Both sets of Plaintiffs move to remand on grounds that Andersen

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did not meet even SLUSA's threshold requisite that each lawsuit be a "covered class action," which by statutory definition needs more than fifty plaintiffs, not two or three.

Andersen opposes remand in both cases. The *Pearson* and *Delgado* Plaintiffs incorporate their motions to remand and supporting memoranda in this joint reply. They now respond briefly to Andersen's argument, made once again, that this case falls within SLUSA's purview. A review of its combined opposition establishes the lack of authority to support the proposition that individual securities-related actions may not be maintained in state court. Plaintiffs also reply to Andersen's erroneous contention that their claims arise under federal law.

In short, nothing in Andersen's opposition allows for the aggregation of plaintiffs in separately filed actions, which is the primary basis for its removal of *Pearson* and *Delgado*. The Court should grant Plaintiffs' motions to remand, and remand *Pearson* to the 164th Judicial District Court of Harris County, Texas, and *Delgado* to the 55th Judicial District Court of Harris County, Texas, where the cases were filed originally.

II. ARGUMENT

A. To the Extent Legislative History is Relevant, It Fully Supports Plaintiffs' Position

Andersen argues that remand should be denied because *Pearson* and *Delgado* are part of a "manipulative scheme to evade SLUSA's removal provisions." *See* opposition at 5. It continues by referring to the legislative history of SLUSA and including an out-of-context excerpt of a Senate report. *Id.* at 6. Andersen's argument lacks merit for two reasons. First, reference to the legislative history of SLUSA is unnecessary in this case. Second, however, the statute's legislative history establishes that individual non-class securities-related actions are entitled to be maintained in state court.

The supreme court is unequivocal about the construction of an unambiguous statute:

> Our first step in interpreting a statute is to determine whether the language issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and "the statutory scheme is coherent and consistent."

See Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997) (citations omitted). Understandably, no court has held SLUSA ambiguous because the statutory language speaks for itself; for a case to be a "covered class action," the statute plainly requires more than fifty plaintiffs. Therefore, under the Supreme Court's instruction, any inquiry must cease at the statute's wording.

Courts' interpretation of SLUSA as an unambiguous statute is hardly a novel legal concept. In fact, this Court has recently concluded just that. *See In re Waste Mgmt., Inc. Secs. Litig.*, _____ F.Supp. 2d _____, 2002 WL 464222 (S.D. Tex. Feb. 5, 2002).

In discussing SLUSA, the Court concluded that the statute "preempt[ed] **class actions** based on state statutory or common law involving a 'covered security' as defined in that act." *Id.* at *2 (emphasis supplied). It continued by observing that therefore "SLUSA in essence made federal court the exclusive venue for **securities fraud class actions** meeting its definitions and ensured they would be governed exclusive by federal law." *Id.* (emphasis supplied). And the Court also noted that "a [House] report indicates that in SLUSA Congress did not evidence an intent to occupy the entire field of securities regulation, but expressly delineated the scope of preemption . . . ." *Id.* Further, according to this Court, "with respect to removal, the plain language of SLUSA . . . evidences Congress' intent to preempt a specifically defined category of state-law class actions . . . ." The Court then went on to provide the statutory definition of a "covered class action." *Id.* at *2-3.

Resort to the history of SLUSA is unnecessary because of its unambiguous wording. Assuming, however, that the Court wishes to look further into the statute's legislative history,

both Senate and House reports establish that individual non-class actions are entitled to be brought and maintained in state court.

In its opposition at 6, Andersen quotes an out-of-context excerpt from a May 1998 Senate report. But the same report, in discussing the definition of "class action," reinforces Plaintiffs' position:

> The definition of class action originally drafted as part of S. 1260 would inadvertently include cases that were beyond the intent of the legislation — such as certain types of individual state private securities actions. . . . .
>
> In order to ensure that individual state actions would not be included as part of the bill's definitions . . . . the committee specifically included a threshold number of 50 or more persons . . . as part of the definition of a class action under this legislation.

See S. Rep. No. 105-182, 1998 WL 226714 at *6. Similarly, some five months later, a Senate conference report noted the following:

> The purpose of [SLUSA] is to help ensure that securities fraud class actions involving certain securities traded on national markets are governed by a single set of uniform standards. **While preserving the right of individual investors to bring securities lawsuits wherever they choose**, the bill generally provides that class actions can be brought only in federal court where they will be governed by federal law.

144 Cong. Rec. S12444-01, 1998 WL 712149 (Cong. Rec.) at *S 12445 (emphasis supplied). Likewise, the House explained that SLUSA was enacted to solve the problem presented by the Private Securities Litigation Reform Act of 1998, Pub. L. 104-67, 109 Stat. 737 (PSLRA). The enactment of the PSLRA resulted in many securities class actions being brought in state court. Therefore, SLUSA was passed "to make federal court the exclusive venue for most securities fraud class action litigation involving nationally traded securities." 144 Cong. Rec. H10771-02, 1998 WL 712049 at *H10775.

In short, the legislative history of SLUSA does not begin to support Andersen's argument. The legislative history, if relevant at all, serves only to further buttress Plaintiffs' position.

In its opposition at 6, Andersen also cites *Gibson v. PS Group Holdings, Inc.,* 2000 WL 777818 (S.D. Cal. June 14, 2000), to support its contention that plaintiffs in separately filed actions may be aggregated to create a "covered class action." *Gibson* is of no help to Andersen. First, the case was an undisputed class action, which obviates Andersen's aggregation theory. Second, despite being a class action the case was remanded (under the Delaware carve-out exception). *Id.* at *6. Third, at issue in *Gibson* was the fact that the class action plaintiffs had deleted a prayer for damages, in an apparent attempt to avoid SLUSA's "covered class action" definition. *Id.* at *3. In no way is *Gibson* controlling here.[1] Significantly, Andersen fails to cite a single opinion holding that plaintiffs in separate suits may be added up to reach SLUSA's fifty-person minimum.

B. Plaintiffs' Claims Arise Under State Law

Realizing that its position on SLUSA rests on precarious legal grounds, Andersen attempts to find an independent jurisdictional basis for the two cases to remain in this Court. It does so by trying to transform the *Pearson* and *Delgado* petitions — both of which advance only state common law claims in state court — into pleadings claiming insider trading under the Securities Exchange Act of 1934. That argument fails as well.

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[1] Andersen also cites *Bertram v. Terayon Comm. Sys., Inc.*, 2001 WL 514358 (C.D. Cal. March 27, 2001), which, like *Gibson*, was brought as a class action. The *Bertram* plaintiffs sought only equitable relief. The court found that the plaintiffs' claim of "restitution" was equivalent to an award of damages, and thus did not avoid SLUSA. *See id.* at *3-4. Therefore, like *Gibson, Bertram* does not apply.

A plaintiff is generally the master of his complaint. *See, e.g., Avitts v. Amoco Prod. Co.*, 53 F.3d 690, 693 (5th Cir. 1995) (citations omitted). Therefore, when both federal and state remedies are available, a plaintiff may elect to proceed exclusively under state law. That election does not give rise to federal jurisdiction. *See id.* (citation omitted).

Under the "artful pleading" doctrine, however, if a right to relief necessarily depends on the resolution of federal law, the case may arise under federal law. *See Franchise Tax Bd. v. Construction Laborers' Vacation Trust*, 463 U.S. 1, 28 (1983). But a "substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims." *Id.* at 13. "[T]he mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 813 (1986). "Rather, in determining federal question jurisdiction, courts must make 'principled, pragmatic distinctions,' engaging in 'a selective process which picks the substantial causes of action out of the web and lays the other ones aside.'" *See Zuri-Invest Ag. v. Natwest Fin. Inc.*, 177 F.Supp. 2d 49, 54 (S.D.N.Y. 2001) (quoting *Merrell Dow).*

Plaintiffs' original petitions advance only common law claims of fraud, negligence and civil conspiracy; and they seek damages based only on those claims. Nevertheless, Andersen tries to recharacterize the two pleadings as seeking affirmative relief under federal securities law. Andersen's removal is improper under this basis as well.

The first and most obvious flaw in Andersen's argument is evidenced by the pleadings themselves. The couple of factual allegations that Andersen manages to extract from two 116-paragraph petitions do not create a substantial federal question. Second, and as important, Andersen's argument is nothing more than an attempt to imbue the Securities Exchange Act of 1934 with preemptive powers that it does not possess.

The Act includes a savings clause unambiguously stating that "the rights and remedies provided . . . shall be in addition to any and all other rights and remedies that may exist at law or in equity." *See* 15 U.S.C. § 77bb(a), as amended. This Court has already acknowledged SLUSA's limited preemptive powers: "in SLUSA Congress did not evidence an intent to occupy the entire field of securities regulation, but expressly delineated the scope of preemption . . . ." *See In re Waste Mgmt. Secs. Litig.,* 2002 WL 464222 at *2; *see also Zuri-Invest Ag.,* 177 F.Supp. 2d at 194; *Gold v. Blinder, Robinson & Co., Inc.*, 580 F.Supp. 50, 53 (S.D.N.Y. 1984) (granting motion to remand); *McMahon Chevrolet, Inc. v. Davis,* 392 F.Supp. 322, 324 (S.D. Tex. 1975) (same). In fact, "few statutes possess 'the extraordinary preemptive power' required to occupy a field of law so entirely as to characterize any claims arising thereunder as federal." *See Zuri-Invest Ag.*, 177 F. Supp. 2d at 195 (citation omitted). Rather, "the Supreme Court has recognized complete preemption in just three areas: labor relations, ERISA, and tribal claims." *See Farkas v. Bridgestone/Firestone, Inc.*, 113 F.Supp.2d 1107, 1111 (W.D. Ky. 2000) (citation omitted). The Fourth Circuit summed up the issue of securities law preemption:

> It is well-settled that federal law does not enjoy complete preemptive force in the field of securities. . . . "[F]ar from preempting the field, Congress has expressly reserved the role of the states in securities regulation.
>
> * * *
>
> *See* . . . 15 U.S.C. § 78bb(a) (1934 Act's authorization for concurrent state regulation in the securities field). The states enjoy broad powers to regulate such diverse subjects as . . . fraud in the sale or purchase of securities and the rendering of investment advisory services.
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> * * *
>
> [A state] therefore may provide additional rights and remedies which do not conflict with federal securities law.
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> * * *

See Baker, Watts & Co. v. Miles & Stockbridge, 876 F.2d 1101, 1107 (4th Cir. 1989); *see also Barbara v. New York Stock Exch., Inc.,* 99 F.3d 49, 55 (2d Cir. 1996) (construing the Exchange Act's savings clause to "plainly refer [ ] to claims created by the Act or by rules promulgated thereunder, but not to claims created by state law").

The *Pearson* and *Delgado* Plaintiffs chose to pursue only state law claims and remedies, as the law obviously entitles them to do. Therefore, Andersen's opposition presents no support for removal on this basis either.

III. CONCLUSION

For all reasons above and in the *Pearson* and *Delgado* Plaintiffs' motions to remand, this Court lacks subject matter jurisdiction. It should order the actions remanded to the 164th and 55th Judicial District Courts of Harris County, Texas, where the two cases were filed originally.

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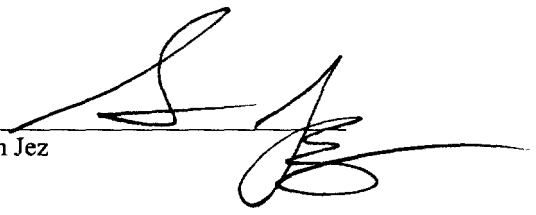
By 
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